Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-613

RICHARD CLEVELAND NOLAN , Petitioner

v.

NATIONAL TRANSPORTATION SAFETY BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

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The Petitioner, Richard Cleveland Nolan, respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on June 25, 1977.

OPINION BELOW

The opinion of the Court of Appeals, not reported and not selected for publication, appears in the appendix hereto.

JURISDICTION

The judgment and opinion of the Court of Appeals for the Tenth Circuit was entered on July 25, 1977. Petitioner petitioned the Court of Appeals for the Tenth Circuit for reconsideration of that judgment and order on August 8, 1977, pursuant to Rule 40 of the Federal Rules of Appellate Procedure. Petitioner's petition for reconsideration was denied by the Court of Appeals on August 30, 1977. This petition for certiorari was filed within 90 days of the date of entry of the judgment and opinion and within 60 days of the date of denial of the petition for reconsideration. This Court's

jurisdiction is invoked under the provisions of 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Is the Court of Appeals required, on review of adjudicatory actions of administrative agencies, to make specific findings as to whether or not each finding of fact of the Administrative agency is supported by substantial evidence in the record, when the basis of the appeal is a challenge to the sufficiency of the evidence to support certain specified agency findings of fact?

2. Did the Court of Appeals, in the present case, abdicate its statutory responsibility under the Federal Aviation Act of 1958, as amended, and the Administrative Procedure Act, as amended, to independently weigh the evidence and make its own findings as to whether or

not the findings of fact of the Board were supported by substantial evidence in the record?

CONSTITUTIONAL, STATUTORY, AND REGULATORY AUTHORITIES

U.S. Const. Amend. V:

> No person shall be...deprived of life, liberty, or property, without due process of law...

Federal Aviation Act of 1958, § 609, (49 U.S.C. § 1429):

> (a) The Administrator may, from time to time, reinspect any civil aircraft, aircraft engine, propeller, appliance, air navigation facility, or air agency, or may reexamine any civil airman. If, as a result of any such reinspection or reexamination, or if, as a result of any other investigation made by the Administrator, he determines that safety in air commerce or air transportation and the public interest requires, the Administrator may issue an order amending, modifying, suspending, or revoking, in whole or in part, any type certificate, production certificate, airworthiness certificate, airman certificate, air carrier operating certificate, air navigation facility

certificate (including airport operating certificate), or air agency certificate. Prior to amending, modifying, suspending, or revoking any of the foregoing certificates, the Administrator shall advise the holder thereof as to any charges or other reasons relied upon by the Administrator for his proposed action and, except in cases of emergency, shall provide the holder of such a certificate an opportunity to answer any charges and be heard as to why such certificate should not be amended, modified, suspended, or revoked. Any person whose certificate is affected by such an order of the Administrator under this section may appeal the Administrator's order to the Board and the Board may, after notice and hearing amend, modify, or reverse the Administrator's order if it finds that safety in air commerce or air transportation and the public interest do not require affirmation of the Administrator's order. In the conduct of its hearings the Board shall not be bound by findings of fact of the Administrator. The filing of an appeal with the Board shall stay the effectiveness of the Administrator's order until the Administrator advises the Board that an emergency exists and safety in air commerce or air transportation requires the

immediate effectiveness of his order, in which event the order shall remain effective and the Board shall finally dispose of the appeal within sixty days after being so advised by the Administrator. The person substantially affected by the Board's order may obtain judicial review of said order under the provisions of section 1006, and the Administrator shall be made a party to such proceedings.

Federal Aviation Act of 1958, § 1006:

(a) Any order, affirmative or negative, issued by the Board or Administrator under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

(b) A petition under this sec-

tion shall be filed in the court for the circuit wherein the petitioner resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia.

* * *

(d) Upon transmittal of the petition to the Board or Administrator, the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of in whole or in part, and if need be, to order further proceedings by the Board or Administrator. Upon good cause shown and after reasonable notice to the Board or Administrator, interlocutory relief may be granted by stay of the order or by such mandatory or other relief as may be appropriate.

(e) The findings of facts by the Board or Administrator, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board or Administrator shall be considered by the court unless such objection shall have been urged before the Board or Administrator or, if it was not so urged, unless there were reasonable grounds for failure to do so.

(f) The judgment and decree of the court affirming, modifying, or setting aside any such order of the Board or Administrator shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in section 1254 of tital 28, United States Code.

Administrative Procedure Act of 1966, by U.S.C. § 706:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

* * *

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

* * *

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

* * *

> In making the foregoing determination, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Rules of Practice in Air Safety Proceedings, 49 C.F.R. § 821.32:

> In proceedings under section 609 of the Act, the burden of proof shall be upon the Administrator.

Rules of Practice in Air Safety Proceedings, 49 C.F.R. § 821.49:

> On appeal, the Board will consider only the following issues:
> (a) Are the findings of fact each supported by a preponderance of reliable, probative, and substantial evidence?
> (b) Are conclusions made in accordance with precedent and policy?
> (c) Have any prejudicial errors occurred?

* * *

STATEMENT OF THE CASE

1. Nature of the Case and Prior Proceedings.

This is a petition for writ of certiorari under 28 U.S.C. § 1254 (1) from a decision of the United States Court of Appeals for the Tenth Circuit entered on July 25, 1977, which affirmed an order of the National Transportation Safety Board. The order revoked the commercial airplane pilot certificate of the Petitioner, Richard Cleveland Nolan.

On February 10, 1976, the Federal Aviation Administration issued an order revoking Mr. Nolan's commercial airplane pilot certificate for alleged violations of the Federal Aviation Regulations and for allegedly having failed to exercise the degree of care, judgment, and responsibility required of the holder of an airman's certificate and for having

demonstrated a lack of qualifications required of the holder of an airman certificate. Mr. Nolan appealed the order of revocation to the National Transportation Safety Board.

A hearing was held before an Administrative Law Judge of that Board on June 16, 1976, in Denver, Colorado. Upon completion of the presentation of the Federal Aviation Administration's case, counsel for Mr. Nolan moved to dismiss the Administrator's complaint (the order of revocation) on the grounds that the Administrator had failed to carry his burden of proof by establishing a prima facie case as to each of the facts alleged in that complaint. The Administrative Law Judge overruled the motion and affirmed the Administrator's order revoking Mr. Nolan's commercial airplane pilot's certificate.

Mr. Nolan appealed this initial decision of the Administrative Law Judge to the full National Transportation Safety Board. On October 20, 1976, the Board issued an order affirming the order of revocation and the initial decision of the Administrative Law Judge. Mr. Nolan petitioned the Board for reconsideration of that order, but that petition was denied by the Board on January 5, 1977. Mr. Nolan sought review in the United States Court of Appeals for the Tenth Circuit. Mr. Nolan argued, on appeal, that the findings of fact of the Board are not supported by a preponderance of reliable, probative and substantial evidence and that the Board's conclusions are not in accordance with Board precedent and policy. On July 25, 1977, the Court of Appeals issued its opinion affirming the order of the Board, with-

out making a finding as to whether each of the Board's findings of fact are supported by substantial evidence. On August 8, 1977, Mr. Nolan petitioned the Court of Appeals to reconsider that opinion on the ground that the opinion did not state such a finding. On August 30, 1977, the Court of Appeals denied this petition for rehearing.

2. The Material Facts.

(a) The Petitioner. Richard Cleveland Nolan is a 66-year old commercial pilot who has amassed approximately 40,000 hours of flying time as pilot-in-command over an aviation career spanning some 41 years since he began flying in 1936. He owns and operates a used aircraft dealership, Dick Nolan Aircraft, Inc., at Greeley, Colorado.

(b) The Violations Charged. In its order of revocation, which served as its

complaint in this case, the Federal Aviation Administration charged that Mr. Nolan had operated an aircraft as pilot-in-command on a passenger carrying flight in the vicinity of Sterling, Colorado, at an altitude of 20,000 feet. The FAA further charged that the aircraft was not equipped with a transponder with automatic pressure altitude reporting capability.

The FAA charged that these alleged acts violated the following provisions of the Federal Aviation Regulations:

> 14 C.F.R. § 91.24
>
> (b) Controlled airspace: all aircraft.--Except for persons operating helicopters in terminal control areas at or below 1,000 feet AGL under the terms of a letter of agreement, and except for person operating gliders above 12,500 feet m.s.l. but below the floor of the positive control area, no person may operate an aircraft in controlled airspace, after the applicable dates prescribed in paragraphs (b)(1) through (b)

(4) of this section, unless that aircraft is equipped with an operable coded radar beacon transponder having a mode 3/A 4096 code capability, replying to mode 3/A interrogation with the code specified by ATC, and is equipped with automatic pressure altitude reporting equipment having a mode C capability that automatically replies to mode C interrogations by transmitting pressure altitude information in 100-foot increments. This requirement applies--

(1) After January 1, 1975, in Group I Terminal Control Areas governed by § 91.90(a);

(2) After July 1, 1975, in Group II Terminal Control Areas governed by § 91.90(b), except as provided therein;

(3) After July 1, 1975, in Group III Terminal Control Areas governed by § 91.90(c), except as provided therein; and

(4) After July 1, 1975, in all controlled airspace of the 48 contiguous States and the District of Columbia, above 12,500 feet m.s.l., excluding the airspace at and below 2,500 feet a.g.l.

and

14 C.F.R. § 91.97 (a) (1):

(a) Except as provided in paragraph (b) of this section, no person may operate an aircraft

within a positive control area, or positive control route segment designated in Part 71 of this chapter, unless that aircraft is--

(1) Operated under IFR at a specific flight level assigned by ATC;

(2) Equipped with instruments and equipment required for IFR operations;

(3) Flown by a pilot rated for instrument flight; and

(4) Equipped, when in a positive control area, with--

(i) A coded radar beacon transponder, having at least a mode A (Military Mode 3) 64-code capability, replying to mode 3/A interrogation with the code specified by ATC, except that, after the applicable dates specified in paragraphs (a) and (b)(3) of § 91.24, the applicable provisions of that section shall be complied with.

The FAA further alleged that Mr. Nolan had failed to exercise the degree of care, judgment, and responsibility required of the holder of an airman's certificate and had demonstrated a lack of qualifications required of the holder of an airman certificate.

3. Decision of the Administrative Law Judge.

The Administrative Law Judge found that the Administrator has established by a preponderance of the evidence all of the allegations set forth in his complaint and that safety in air commerce or air transportation and the public interest require affirmation of the Administrator's order of revocation.

4. Decision of the National Transportation Safety Board.

On October 20, 1976 the National Transportation Safety Board denied Mr. Nolan's appeal and affirmed the Administrator's order and the initial decision revoking his commercial pilot certificate.

The Board adopted the findings of the Administrative Law Judge as its own.

5. Decision of the Court of Appeals.

On July 25, 1977 the Tenth Circuit

affirmed the Board's opinion revoking Mr. Nolan's commercial pilot certificate.

The court of appeals found that the Board's action was in accordance with the law and was within the discretion vested in it. The only evidence as to whether or not the aircraft was equipped with a transponder having the required altitude reporting capabilities came from FAA witness Derek Lucas, who piloted the aircraft on at least a portion of the flight. Mr. Nolan specifically challenged the substantiality of this evidence as inadequate to support the finding by the Administrative Law Judge and the Board that his aircraft was not properly equipped. The court of appeals refused to weigh the substantiality of this evidence deferring entirely to the province of the Administrative Law Judge as though the only question before it

were one of credibility, and not of substantiality. (Opinion of the Court, at 4).

ARGUMENT

A. Introduction and Summary.

The court of appeals is clearly in error and has repudiated its statutory duty by failing and refusing to independently examine and weigh the evidence and render its own independent finding as to whether or not each of the findings of fact of the Board is based upon substantial evidence.

This refusal to rigidly apply the "substantial evidence" test operates to deny Petitioner his right to due process of law as guaranteed by the due process clause to Amendment V of the Constitution of the United States.

B. Applicability of Due Process Guarantee.

The Fifth Amendment to the Constitution of the United States does provide that "no person shall. . . be deprived of life, liberty, or property, without due process of law." Included within the concepts of liberty and property is the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference. Greene v. McElroy, 360 U.S. 474, 492 (1959). Those fundamental requirements of fairness which are the essence of due process in a proceding of a judicial nature are also required in administrative adjudicatory hearings. An administrative adjudicatory hearing which does not afford such fundamental protections is fatally defective. Morgan v. United States, 304 U.S. 1, 18-22 (1938). Indeed, the manifest purpose in requiring

a hearing is to comply with the requirements of due process upon which the parties affected by the determination of an administrative body are entitled to insist. Shields v. Utah Idaho Central R. Co., 305 U.S. 177, 182 (1938). Due process in administrative proceedings of a judicial nature has been said generally to require conformity to fair practices of Anglo-Saxon jurisprudence. Hornsby v. Allen, 326 F.2d 605, 608 (5th Cir. 1965). The right to a fair and open hearing conforming the prerequisites of due process is assured to all parties by the due process clauses of the U. S. Constitution and cannot be compromised by administrative agencies. Ohio Tel. Co. v. P.U.C., 301 U.S. 292 (1937). Adjudicatory administrative proceedings required by statute must conform to the requirements of the Administrative

Procedure Act if resulting orders are to have validity. Wong Yang Sung v. McGrath, 339 U.S. 33 (1950).

In our legal system, the only evidentiary hearing available in air safety proceedings is before the Administrative Law Judge of the National Transportation Safety Board. It is, therefore, absolutely essential that the requirements of due process be honored, and not receive mere lip service, in such hearings.

Congress has entrusted to the Courts of Appeals the duty to determine, on review of adjudicatory proceedings of administrative agencies, whether the record discloses substantial evidence to support the agency's findings. Universal Camera Corp. v. N. L. R. B., 340 U.S. 474, 491 (1951). This is the only check provided by law to assure that persons

subjected to the punitive actions of administrative agencies have not suffered administrative sanctions without a substantial evidentiary showing of good legal cause therefore.

C. Scope of Review.

The Courts of Appeals are strictly limited by statute in reviewing the evidentiary basis of decisions of the National Transportation Safety Board in cases of this nature. The Federal Aviation Act of 1958, as amended, provides at 49 U.S.C. § 1486(e) that the Board's findings of fact are conclusive, if supported by substantial evidence. The Administrative Procedure Act, at 5 U.S.C. § 706, requires that the reviewing court hold unlawful and set aside agency findings found to be unsupported by substantial evidence in cases reviewed on the record of an agency hearing as

required by statute.

Similarly, at the stage of intra-agency review, the full Board is required by the provisions of the Rules of Practice in Air Safety Proceedings, 49 C.F.R. § 821.49 to determine whether or not the Administrative Law Judge's findings of fact are each supported by a preponderance of reliable, probative and substantial evidence.

In Universal Camera Corp. v. N. L. R. B., 340 U.S. 474, 493 (1951), this Court stated, in reference to similar language in the statutes governing the proceedings of the National Labor Relations Board:

> It is therefore difficult to escape the conclusion that the plain language of the statutes directs a reviewing court to determine the substantiality of evidence on the record. . .

In that case, this Court, at 497, remanded that case to the court of

appeals to answer "the comprehensive question whether the evidence supporting the Board's order is substantial."

More recently, in Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1970) this Court has confirmed that that provision of the Administrative Procedure Act cited above requires the court of appeals, upon review of agency action, to make a specific finding of compliance with the standards enumerated in the Act. In Illinois Central R. Co. v. Norfolk & W. R. Co., 385 U.S. 57, 66 (1966) this Court held that on its review of the decision of a court of appeals in an action for judicial review of administrative agency proceedings the opinion of the court below must lead this Court to conclude that the lower court was applying the test of substantiality.

Similarly, in Alsbury v. United States Postal Service, 392 F. Supp. 71, 74 (C.D. Cal. 1975); aff'd, 530 F.2d 852 (9th Cir. 1976, cert. denied, 97 S. Ct. 85 (1977), it is noted that:

> More recently, however, the trend has been to enlarge the judicial review test to require a judicial finding that the agency's factual determinations were and are "supported by substantial evidence." (Emphasis supplied)

This Court, in N. L. R. B. v. Columbian Enameling & Stamping Co., 306 U.S. 292, 300 (1939), noting that substantial evidence is more than a scintilla, but may be less than a preponderance, stated:

> It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.
>
> * * *
>
> . . . enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn

from it is one of fact for the jury.

The primary responsibility of the courts of appeals in applying the "substantial evidence" test to agency adjudicatory proceedings is to assure that due process guarantees has been afforded the citizen and to prevent "rubber-stamping" of administrative hearings which could allow or encourage such hearings to deteriorate into mere ritualistic charades.

Yet, in the present case, the Court of Appeals refused to independently evaluate the substantiality of the evidence supporting one of the two violations charged (the allegation that the aircraft was not properly equipped), because it chose to characterize this as a question of credibility of the witness within the exclusive province of the Administrative Law Judge.

This is an especially crucial question in the present case, since the testimony of that witness was the only evidence to support a finding of one of the two violations alleged (that relating to the adequacy of the equipment on board the aircraft). Indeed, the testimony of the witness was so inadequate that it would be tantamount to a situation in which a witness in a murder case were to testify, without foundation, "Yes, I saw the defendant murder Mr. Brown", and then be utterly unable to answer any other questions or recall any of the facts and circumstances surrounding the fact stated in such a bare-faced allegation.

To allow the Court of Appeals to abdicate its statutory responsibility to independently examine the substantiality of the evidence would clearly vitiate

any hopes of citizens whose rights are entrusted to administrative agencies for adjudicatory determination of receiving the benefits of due process. Permitting such neglect by the lower courts would make a mockery of the entire constitutional and statutory scheme for protection of individual liberties and flies in the face of this Court's considerable body of meticulously-reasoned decisions in the area of administrative due process.

CONCLUSION

The decision of the Tenth Circuit in this case has decided a federal question in a way in conflict with applicable decisions of this Court and has so far departed from the accepted and usual course of judicial proceedings and sanctioned such a departure by the National Transportation Safety Board as

to call for an exercise of this Court's power of supervision. For these reasons, this Court should review this case on writ of certrorari.

Respectfully submitted,

J. SCOTT HAMILTON (2176)
Attorney for Petitioner
2255 East 18th Avenue
Denver, Colorado 80206
(303) 321-2225

CERTIFICATE OF MAILING

This is to certify that I have this ____ day of October, 1977 placed a true and correct copy of the above and foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit and Appendix in the United States Mail, postage prepaid thereon, addressed to: Morton Hollander and Allen H. Sachsel, Attorneys for Respondent, Department of Justice, Civil Division, Appellate Section, Washington, D.C. 20530

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APPENDIX.

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APPENDIX

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UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

JOHN L. McLUCAS, ADMINISTRATOR
FEDERAL AVIATION ADMINISTRATION

vs.

RICHARD L. NOLAN

Docket No. SE-3212

ORAL INITIAL DECISION

OF JERRELL R. DAVIS,

ADMINISTRATIVE LAW JUDGE

This proceeding was instituted before the National Transportation Safety Board pursuant to the provisions of Section 609 of the Federal Aviation Act of 1958, as amended (49 USC 1429), and the Board Rules of Practice in Air Safety Proceedings (49 CFR 821), by Richard C. Nolan, hereinafter referred to as Respondent, who appealed from an Order of the Administra-

tor, Federal Aviation Administration, revoking his commercial pilot certificate.

The basis for revocation are set forth in the complaint as follows:

(a) Violation of Section 91.24(b) of the Federal Aviation Regulations (FAR), in that Respondent operated an aircraft in controlled airspace when such aircraft was not equipped with automatic pressure altitude reporting equipment;

(b) Violation of Section 91.97(a)(1) of the FAR, in that Respondent operated an aircraft within a positive control area when he did not operate under IFR at a specific flight level assigned by ATC;

(c) Failure of Respondent to exercise the degree of care, judgment and responsibility required of the holder of an airman certificate; and

(d) Respondent's demonstration that he lacks the qualifications required of a

holder of an airman certificate.

The alleged facts giving rise to these charges are as follows:

(1) Respondent was on August 7, 1975, and still is, the holder of Commercial Pilot Certificate No. 355570.

(2) On August 7, 1975, Respondent operated civil aircraft N2511U, a Cessna 337, as pilot-in-command on a passenger carrying VFR flight in the vicinity of Sterling, Colorado.

(3) Incident to said flight, Respondent contacted Air Traffic Control and reported his altitude to be 20,000 feet. At the time Respondent contacted ATC, he had not received an IFR clearance and was operating under visual flight rules.

(4) At all times mentioned herein, all altitudes in excess of 18,000 feet MSL were within positive control air-

space.

(5) At all times mentioned herein, said aircraft was not equipped with a transponder equipped with automatic pressure altitude reporting capability.

(6) By reason of the foregoing facts and Respondent's history of repeated violations of the FAR, Respondent has demonstrated that he lacks the qualifications required of the holder of a commercial pilot certificate.

Respondent, as stated in his filed answer and amended at the hearing, has admitted Paragraph (1) above. He has denied the remaining paragraphs. He has also denied that he violated the cited sections of the FAR and that he lacks qualifications to hold an airman certificate.

The appeal was assigned to me for oral hearing and initial decision. Hearing was held today in Denver, Colorado,

Section 821.32 of the Board's Rules of Practice in Air Safety Proceedings provides that, in proceedings under Section 609 of the Act, the burden of proof shall be upon the Administrator.

Three witnesses testified on behalf of the Administrator, and they sponsored four exhibits. The Respondent elected not to testify in his own behalf. His counsel did, however, offer one exhibit. The testimony and documentary evidence deemed pertinent may be summarized as follows:

Harold D. Peterson was the ATC Specialist on duty at the Denver Air Route Traffic Control Center on August 7, 1975, and testified concerning his radio transmissions with the Cessna 337, the aircraft involved in this proceeding. The transcript of the recorded conversations between Controller Peterson and the Cessna

337 are reflected in Exhibit A-1. That exhibit indicates that the Cessna 337 reported his position as approximately 20 miles east of Sterling, at which time he requested an IFR clearance on its present position to North Platte at an altitude of 20,000 feet. On three occasions, upon being questioned by the Witness Peterson, the voice transmission from the Cessna 337 indicated an altitude of 20,000 feet. Later, the aircraft was again requested to advise its altitude, at which time a response of 20,500 feet was given. When advised by the Denver Center that the aircraft should not be above 17,500 VFR, the response received was that the Cessna 337 was checking its turbo system and would like to continue to check it at that altitude, at which point the aircraft was instructed to descend to 17,500 and to request an IFR clearance to go above such

altitude. Witness Peterson stated that at no time was there any altitude read out information of the Cessna 337 displayed on his radarscope. There were no mechanical computer problems with the radar equipment. This witness further testified that positive control area (PCA) starts at 18,000 feet and extends upward to 60,000 feet. He described PCA as a "sterilized area", which is so characterized as a safety factor. While he was aware of the target function of the aircraft's transponder, no altitude function was displayed on his radarscope and he concluded that automatic pressure altitude reporting equipment was either not present, turned off, or inoperable.

Allen B. Robbins, General Aviation Operations Inspector for the FAA GATO in Broomfield, Colorado, conducted an investigation of the August 7, 1975 incident

as a result of receiving an incident report from the Denver Center (Exhibit A-4). This witness also sponsored Exhibits A-2 and A-3. With respect to Exhibit R-1, sponsored by Respondent's counsel, Inspector Robbins stated that he was subsequently advised by Derek Lucas that the correct altitude of the Cessna 337 was 20,000 feet at the time an IFR clearance was requested from the Denver Center. This witness further testified that an altitude of 12,000 feet would not be appropriate for checking a turbo system and that 20,000 feet would be more appropriate. He also expressed the view that a commercial pilot should be able to read an altimeter and to know and be familiar with PCA. Each aircraft, he stated, is under positive control in PCA to assure safety; otherwise, safety is diminished to a considerable extent. He considers

the violation with which Respondent is charged as "extremely serious".

Derek Lucas was the last witness to testify on behalf of the Administrator. He is the holder of a commercial pilot certificate with the usual ratings and has accumulated some 2800 hours flight time. He occupied the right seat of the Cessna 337 on August 7. He stated that the Cessna 337 was equipped with a transponder, but had no automatic pressure altitude reporting capability. When the aircraft took off from Weld County Airport, Greeley, Colorado, Mr. Lucas was at the controls and continued at the controls of the aircraft until it leveled off at 11,500 feet, at which time the Respondent assumed control of the aircraft and Witness Lucas handled the radio transmissions. He further testified that a flight plan was filed and that Re-

spondent was shown thereon as the pilot-in-command. He stated that after Respondent assumed control of the aircraft at 11,500 feet, the Respondent continued a steady climb to 20,000 feet. The altimeter had been set to the field elevation of the Weld County Airport and, when the aircraft passed through an altitude of 18,000 feet and was still climbing, Witness Lucas set the altimeter at 29.92 standard barametric pressure. He testified that he made all of the voice transmissions from the Cessna 337 as reflected in Exhibit A-1. He conceded that he wrote the letter (Exhibit R-1) indicating that the aircraft's altitude was 12,000 feet instead of 20,000 feet. He stated that such information was erronnous and the purpose of the letter was a cover-up for Respondent. He corroberated Inspector Robbins' statement that he sub-

sequently informed the Inspector that the correct altitude was 20,000 feet at the time an IFR clearance was requested from the Denver Center. He also admitted that he logged his time in his log book as the pilot-in-command.

The credibility of Witness Lucas' testimony is crucial to resolution of the issues raised in this proceeding. Having carefully observed his demeanor on the stand here today in conjunction with the other evidence of record, I accept his testimony under oath as credible and reliable. The mere fact that he may have distorted the facts in his letter of September 20, 1975 (Exhibit R-1), does not, in and of itself, convince me that his testimony here today was not forthright and honest. The radio transmissions between the aircraft and Denver Center support the testimony adduced by

this witness on the stand here today. In this respect, it should be noted that the Respondent, in his letter of September 12, 1975, (Exhibit A-2), admits that he was flying the Cessna 337 on August 7, 1975, and that he had "a young man with me who was sitting on the right side and he was doing the radio calling." It seems incredible to me that Respondent, being aware at that time of the charges against him, would not have made it clear in this letter that he was not the pilot-in-command of the aircraft. This defense of Respondent not being pilot-in-command impresses me as an afterthought. In short, it's my conclusion that the testimony of the two witnesses preceeding Witness Lucas and the documentary evidence show clearly that the statement made in Witness Lucas' letter of September 20, 1975, was nonfactual and was intended as

a cover-up.

Turning to the question of sanction, the Administrator proposed the ultimate sanction based on the charges set forth in the Complaint - - which I feel have been established by a preponderance of the reliable evidence --- viewed in light of Respondent's history of prior violations. The record reflects that in 15 instances, Respondent has either paid a civil fine for FAR infractions or has had certificate action taken against him. With respect to precedent, the Board has generally upheld the revocation of airman certificates only in certain types of cases such as those involving (a) flying while intoxicated, (b) student pilots carrying passengers, (c) falsification of applications of records, (d)numerous and/or flagrant or deliberate violations. The Board has also affirmed revocations in

cases where the established violations considered in conjunction with a history of prior violations were deemed to warrant that sanction. Administrator vs. Smoligan, EA-423, and Administrator vs. McCarthy, EA-456. Respondent's violation history, in my opinion, reflects a cavalier attitude toward compliance with the FAR and demonstrates a pattern of flagrant disregard for the regulations. I feel that the Administrator has shown through a preponderance of substantial, reliable and probative evidence that the Respondent violated the cited sections of the FAR, and that his history of prior violations demonstrates that he lacks the qualifications required of a holder of a commercial pilot certificate.

Contentions of the parties as to fact or law which are not specifically discussed hereinabove have been given due

consideration and are found to be either not materially significant or not justified.

FINDINGS AND ORDER

Based on all evidence of record, I find that (1) the Administrator has established by a preponderance of the evidence all of the allegations set forth in the Complaint, and (2) safety in air commerce or air transportation and the public interest require affirmation of the Administrator's Order of Revocation.

IT IS ORDERED, That the Administrator's Order of Revocation be, and it is hereby, affirmed.

IT IS FURTHER ORDERED, That, unless the Board on its own initiative decides to review this decision or Respondent files a timely Notice of Appeal, this Order shall become effective July 6, 1976, and Respondent shall on that date

phys.cally surrender his certificate to an appropriate representative of the FAA pursuant to Section 61.19(f) of the FAR.

Dated at Denver, Colorado, this 16th day of June, 1976.

JERRELL R. DAVIS
Administrative Law Judge

SERVED: October 20, 1976

NTSB Order No. EA-910

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the
NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 13th day of October 1976.

JOHN L. McLUCAS, Administrator, Federal Aviation Administration, Complainant,	
vs.	Docket SE-3212
RICHARDL CLEVELAND NOLAN, Respondent.	

OPINION AND ORDER

Respondent has appealed from the initial decision of Administrative Law Judge Jerrel R. Davis, issued orally at the conclusion of the hearing held in this proceeding on June 16, 1976.[1/] The law

1/ An excerpt from the hearing transcript containing the initial decision is attached.

as pilot-in-command civil aircraft N2511V, a Cessna T337B, on a passenger carrying visual flight rules (VFR) flight in the vicinity of Sterling, Colorado; that during said flight respondent reported the aircraft to be at an altitude of 20,000 feet, which is within positive control airspace;[2/] and that respondent was in violation of the following provisions of the Federal Aviation Regulations (FAR):

Section 91.24(b),[3/] in that he operated an aircraft within a positive

---

2/ Altitudes in excess of 18,000 feet m.s.l. are within positive control airspace.

3/ § 91.24(b), in pertinent part, reads as follows:

"§ 91.24 ATC transponder equipment.

* * * * *

(b) Controlled airspace: all aircraft. Except for persons operating helicopters in terminal control areas at or below 1,000 feet AGL under the terms of a letter of agreement, and except for persons operating gliders above 12,500 feet m.s.l. but below the floor of the positive control area, no person may

(footnote 3/ continued)

operate an aircraft in controlled airspace, after the applicable dates prescribed in paragraphs (b)(1) through (b)(4) of this section, unless that aircraft is equipped with an operable coded radar beacon transponder having a mode 3/A 4096 code capability, replying to mode 3/A interrogation with the code specified by ATC, and is equipped with automatic pressure altitude reporting equipment having a mode C capability that automatically replies to mode C interrogations by transmitting pressure altitude information in 100-foot increments. This requirement applies--

(1) After January 1, 1975, in Group I Terminal Control Areas governed by § 91.90(a);

(2) After July 1, 1974, in Group II Terminal Control Areas governed by §91.90 (b);

(3) After July 1, 1975, in Group III Terminal Control Areas governed by § 91.90 (c), except as provided therein; and

(4) After July 1, 1974, in all controlled airspace of the 48 contiguous States and the District of Columbia, above 12,500 feet m.s.l., excluding the airspace at and below 2,500 feet a.g.l."

control airspace when it was not equipped with automatic pressure altitude reporting equipment; and Section 91.97(a)(1),4/ in that he operated an aircraft within a positive control area but not under IFR at a specific flight level assigned by air traffic control. The law judge concluded that, upon consideration of the foregoing violations in conjunction with respondent's history of prior violations, safety and the public interest require affirmation of the Administrator's order revoking respondent's commercial pilot certificate.

4/ Section 91.97, in pertinent part, reads as follows:
"§ 91.97 Positive control areas and route segments.
(a) Except as provided in paragraph (b) of this section, no person may operate an aircraft within a positive control area, or positive route segment designated in Part 71 of this chapter, unless that aircraft is--
(1) Operated under IFR at a specific flight level assigned by ATC;"

In support of his appeal, respondent (through counsel) has filed an appeal brief wherein he argues that the preponderance of evidence does not support the law judge's findings (a) that respondent was pilot-in-command of N2511V at the time of the alleged violations, (b) that respondent contacted air traffic control and reported his altitude to be 20,000 feet, and (c) that all altitudes in excess of 18,000 feet were within positive control airspace. Respondent also maintains that the law judge erred in finding credible the testimony of one of the Administrator's witnesses (the other occupant of the plane) and in concluding that respondent's certificate should be revoked.

The Administrator, in turn, has filed a reply brief opposing respondent's appeal and urging that the initial de-

cision be affirmed.

Upon consideration of the briefs of the parties, and the entire record, the Board has determined that safety in air commerce or air transportation and the public interest require affirmation of the Administrator's order of revocation. We adopt as our own the findings of the law judge.

The principal witness, appearing on behalf of the Administrator, was the person occupying the right seat of N2511V on the flight in question.[5/] This witness testified that respondent was listed on the VFR flight plan, and in fact acted, as pilot-in-command; that the respondent climbed the plane to an altitude of 20,000 feet, whereupon, at respondent's request, the witness called ATC and asked

5/ He was traveling on the flight for the purpose of picking up an aircraft at the destination and ferrying it back to the originating point.

for an IFR clearance, reporting the flight's altitude (accurately) to be 20,000 feet, and that the aircraft transponder did not have automatic pressure altitude reporting capabilities.

As respondent stresses in his appeal brief, the aforesaid witness made statements which were inconsistent with, or contradictory of, portions of his testimony.[6/] The law judge, recognizing that the credibility of this witness was "crucial to the resolution of the issues in this proceeding"

6/ This witness wrote a letter to the FAA during the investigation of the incident wherein he stated that his radio report to ATC that the aircraft was at 20,000 resulted from a misreading of the altimeter due to parallax, whereas the actual altitude of the plane at that time was 12,000 feet. He explained at the hearing that he prepared this letter (Exhibit R-1) at the behest of respondent, who thereby hoped to avert an enforcement action. At another point in his testimony, this witness stated that he logged his time on the flight as pilot-in-command.

(Tr.151-152), discussed his testimony, including the various inconsistences and contradictions, in considerable detail. The law judge concluded that "having carefully observed his demeanor on the stand today in conjunction with the other evidence of record, I accept his testimony under oath as credible and reliable" (Tr.152). The Board has no reason to disturb that finding, resting as it does on a credibility assessment which is exclusively within the province of the trier of fact.

We also note that the testimony of the above witness, apart from being found credible by the law judge, is supported by other evidence of record on key points. For example, with respect to the pilot-in-command issue, the Administrator intro--duced into the record a letter sent to the FAA during the incident investigation in

which respondent stated that "there was a young man with me who was sitting on the right side and he was doing the radio calling",[7/] which statement seems to belie respondent's contention that the right seat occupant was acting as the pilot-in-command. In addition, the repeated transmissions from N2511V reporting their altitude as 20,000 feet[8/] which undercuts respondent's claim that the report that the plane was at 20,000 feet was a mistake and that the plane was actually at 12,000 feet. Finally, the absence of an altitude reporting capability on the transponder of N2511V is

7/ Exhibit A-2.

8/ There were approximately 8 such transmissions, as reflected by the certified transcription(Exhibit A-1). The fact that these radio reports were made by the right seat occupant, rather than by respondent (as charged in the complaint), is not fatal to the Administrator's case since respondent, as pilot-in-command, was responsible for the plane being at an altitude of 20,000 feet.

supported by the controller's testimony that he did not observe any altitude information associated with the target of respondent's plane as depicted on the controller's radar scope.

In view of the foregoing, the Board concludes that the Administrator has established, by a prepondernance of the reliable, probative, and substantial evidence of record, that respondent was pilot-in-command of an aircraft which was operated at an altitude of 20,000 feet (therefore within positive control airspace) but which was not under an IFR flight plan and was not equipped with automatic pressure altitude reporting equipment. It therefore follows that respondent was in violation of sections 91.24(b) and 91.97(a)(1) of the FAR.

As the Administrator acknowledges, the violations established herein, albeit serious in nature,[9/] by no means warrant the ultimate sanction of revocation. Rather, revocation was based on those violations considered in conjunction with respondent's history of prior violations. This history (Exhibit A-3) indicates that, during the period between 1952 and 1973, there were 22 instances in which respondent was alleged to have committed violations of the FAR. Although 7 of these were closed without action, one resulted in the issuance of a reprimand, 8 others resulted in the payment of civil penalties ranging from $25 to $375, and the remain-

9/ The purpose of a positive control area is to establish blocks of airspace in which all aircraft are under IFR flight plans and under positive control by ATC. Aircraft operating under VFR and not under positive control thus create a potential hazard when they intrude into such airspace.

ing 6 resulted in suspensions of respondent's airman certificate. With respect to the latter category, respondent's certificate was suspended for 60 days in 1961, for 90 days in 1962, and for 6 months in 1973. The 6-month suspension was based on 4 separate incidents which involved violations of basic ATC rules, such as flying improper patterns in airport traffic areas thereby causing a collision hazard, forcing another plane to take evasive action, landing without maintaining two-way radio communications with the control tower, landing IFR conditions without an appropriate clearance, and taking off without takeoff clearance from ATC.

The regulatory violations established herein, considered in light of respondent's history as described above, indicate the continuance of a pattern of

conduct characterized by a disregard of basic air traffic control rules and safe operating practices. The immediate violations also show that respondent has not been deterred from committing these types of violations by the numerous civil penalties and certificate suspensions he has heretofore received. Under these circumstances, and in view of precedent,[10/] it is our conclusion that respondent has demonstrated that he lacks the qualifications to hold his airman certificate, which is therefore subject to revocation.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal be and it hereby is denied;

2. The Administrator's order and the initial decision be and they hereby

10/ See, eg.g., Administrator v. McCarthy, Order EA-456 April 25, 1973; Administrator v. Smoligan, Order EA-423, January 17, 1973.

are affirmed; and

3. The revocation of respondent's commercial pilot certificate shall commence 30 days after service of this order.11/

TODD, Chairman, BAILEY, Vice Chairman, McADAMS, HOGUE, and HALEY, Members of the Board, concurred in the above opinion and order.

11/ For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the Federal Aviation Administration pursuant to section 61.19(f) of the FAR.

NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 76-2144

RICHARD CLEVELAND NOLAN, Petitioner, vs. NATIONAL TRANSPORTATION SAFETY BOARD, Respondent.	On Petition for Review of an Order of the National Transportation Safety Board

Submitted on the briefs.

J. Scott Hamilton for Petitioner.

Barbara Allen Babcock, Assistant Attorney General, and Morton Hollander and Allen H. Sachsel, Attorneys, Civil Division, Appellate Section, Department of Justice, for Respondent.

Before HILL, SETH and DOYLE, Circuit Judges.

DOYLE, Circuit Judge.

We here review a decision of the

National Transportation Safety Board, which decision revoked the pilot's license of the appellant Richard Cleveland Nolan. The Board's order which was dated October 20, 1976, revoked all certificates held by Nolan and was based on violations of 14 C.F.R. 91.24(b) and 91.97(a)(1). The Board also considered a total of 15 previous violations, six of which the Board found were serious enough to have warranted suspension of certificate. The Board's order affirmed the decision of the Federal Aviation Administration and the original decision of the Administrative Law Judge of the Board. The review is pursuant to 49 U.S.C. § 1486.

The Board summed up its decision by saying that the violations shown and considered in the light of the petitioner history indicated a pattern of conduct

characterized by disregard of basic air traffic practices. The Board further determined that the petitioner had not been deterred from committing these violations by the numerous civil penalties and suspensions that he had received. Based on that, the Board concluded that the respondent had demonstrated a lack of qualifications necessary to hold his airman's certification.

The issues are:

1. Whether the Board's findings of fact were supported by substantial evidence,

2. Whether the Board's conclusions were proper in terms of being in accordance with precedent and policy and whether they reflected a proper exercise of discretion.

The violation which brought on revocation of all certificates occurred

August 7, 1975, while Nolan was piloting a passenger-carrying Cessna T337B which was then departing from Weld County Airport near Greeley, Colorado. The purpose of the flight was to test the plane and to deliver it to Fremont, Nebraska. Near Sterling, Colorado, Nolan's co-pilot contacted air traffic control at Denver and reported his altitude as 20,000 feet. A request was made for clearance to North Platte, Nebraska.

Air space above 18,000 feet is subject to the absolute control of air traffic controllers and the so-called instrument flight rules apply. Clearance must therefore be obtained from air traffic controllers to enter a specific altitude. Also, they must have certain equipment which enables the air traffic controller to determine on a screen the

altitude of a particular aircraft.

As a result of this incident, Nolan was charged with operating the aircraft in restricted air space without a transponder with automatic pressure reporting capabilities and also with entering the restricted air space without the required permission. It is true that Derek Lucas, who was the co-pilot, was the one who contacted the air traffic controller and who reported the altitude. This fact is of little legal significance in view of the fact that Nolan was in command of the aircraft and directed the operation of the radio. Therefore, although Nolan did not contact the controller himself, he was responsible for the contact.

The important thing is that his altitude was beyond the limit and the evidence unquestionably supports this. It is also said that there was insufficient

evidence to show that Nolan was operating the aircraft in positive control air space, and evidence of this was necessary in order to show violation of 14 C.F.R. § 91.24(b), which requires that aircraft operating in such air space be equipped with automatic pressure altitude reporting equipment.

We disagree with the argument of petitioner that the Board's finding that the plane was in excess of 18,000 feet does not establish that the exception in favor of aircraft operating in air space altitude within 2,500 feet above ground level does not apply. Thus, he says in effect that it was necessary to show what the ground level was. In order to come within the exception, the elevation would have had to have been at least 15,500 feet. We take judicial notice of the fact that no such altitude exists in the

Sterling, Colorado area.

Nolan also challenged the finding of the Board that the airplane was not equipped with a transponder having an automatic pressure altitude reporting capability. The argument of Nolan is that Lucas, the co-pilot who testified that the transponder on the aircraft did not have an automatic reporting capability is discredited by the uncertainty of Lucas on cross-examination as to the capability of the transponder. However, we are of the opinion that this does not void the finding of the Administrative Law Judge, who was required to assess the reliability of Lucas' testimony and did so. This was within his province. See Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 (1951). There is no reason shown for disregarding this testimony.

Finally, it is complained that the

Board was not justified in holding that as a result of his basic violations coupled with the present one, the evidence showed a lack of qualification to hold a commercial pilot certificate. Nolan points to his extensive flying experience during 41 years and 40,000 hours, during all of which time he did not have an accident. He also complains about the other violations which were taken into account. But these were numerous and serious. For example, on two occasions in November 1967, Nolan was shown to have allowed his aircraft to operate in unairworthy condition. In March 1971, he entered a traffic pattern below the pattern altitude, cut in front of an aircraft in the pattern for a landing, overtook an aircraft which was landing and landed in front of it, coming within 15 feet of causing a collision. There were

several similar incidents. Nolan maintains that these were largely petty and in come instances no charges were brought against him.

We have examined the numerous violations shown and in our judgment it was proper for the Board to take them into account as showing a pattern of conduct which displayed a lack of qualifications to hold a commercial pilot's certificate.

The Board has ample discretion under 49 U.S.C. § 1429 to promote air safety in the public interest. This was pointed out in French v. C.A.B., 378 F.2d 468, 472 (10th Cir. 1967), where it was also held that it was not error to consider prior violations in determining a suitable sanction. Not only was the instant violation serious, the prior ones resulting in three previous certificate suspensions, eight civil penalties and one

reprimand also were serious. In this set of circumstances revocation did not constitute an abuse of discretion. Furthermore, it was in accordance with the sanctions which the Board has imposed in similar cases. See, e.g., Administrator v. McCarthy, No. SE-1972 at 7-8 (May 8, 1973); Administrator v. Smoligan, No. SE-1534, at 5-6 (Jan. 29, 1973); Administrator v. Santos, No. SE-1341 at 5 (July 22, 1971).

Being of the opinion that the Board's action was in accordance with the law and was within the discretion vested in it, we uphold its decision revoking the license. It is so ordered.

JULY TERM - August 30, 1977

Before The Honorable Delmas C. Hill, Senior Circuit Judge, The Honorable Oliver Seth and The Honorable William E. Doyle, Circuit Judges

RICHARD CLEVELAND NOLAN,

Petitioner,

vs. No. 76-2144

NATIONAL TRANSPORTATION SAFETY BOARD,

Respondent.

This matter comes on for consideration of petitioner's petition for rehearing in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied.

HOWARD K. PHILLIPS
Clerk

Supreme Court, U. S.
FILED
DEC 20 1977
MICHAEL RODAK, JR., CLERK

No. 77-613

In the Supreme Court of the United States

OCTOBER TERM, 1977

RICHARD CLEVELAND NOLAN, PETITIONER

v.

NATIONAL TRANSPORTATION SAFETY BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-613

RICHARD CLEVELAND NOLAN, PETITIONER

v.

NATIONAL TRANSPORTATION SAFETY BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner seeks to invalidate the order of the National Transportation Safety Board that revoked his commercial airplane pilot certificate.

The Federal Aviation Administration revoked petitioner's certificate after an incident in August 1975 in which he piloted a passenger-carrying Cessna 337 in a restricted high-altitude air space without clearance from air traffic controllers and without equipment required by air safety regulations (Pet. App. 34-35). The Administration concluded that this incident, which followed some fifteen earlier violations of air safety standards, demonstrated petitioner's failure to exercise the care, judgment, and responsibility required of a commercial pilot (Pet. App. 4). After an evidentiary hearing on petitioner's appeal from the Administration's order, an administrative law judge held

that the order was supported by "a preponderance of substantial, reliable and probative evidence" (Pet. App. 14). The National Transportation Safety Board affirmed this decision (Pet. App. 29-30), and petitioner filed a petition for review in the court of appeals.

The court of appeals held that the Board's action was based upon substantial evidence that petitioner exceeded the altitude limit without clearance and that the aircraft was not properly equipped (Pet. App. 35-37), and that the Board did not abuse its discretion in determining on the basis of this and earlier violations that petitioner's license should be revoked (Pet. App. 37-40).

The decision of the court of appeals is correct and review by this Court is not warranted.

Petitioner argues (Pet. 18-19, 27-29) that he was denied due process of law because, he alleges, the court of appeals failed to determine whether the Board's finding that the plane was not properly equipped for the altitude at which it was flying was supported by substantial evidence. Specifically, he contends that the court of appeals failed adequately to evaluate the evidence supporting the order because it adopted the administrative law judge's conclusions concerning the credibility of a witness who testified that the plane was not properly equipped.

It is well-established, however, that the credibility of a witness is a matter that the official conducting the hearing is in a particularly favorable position to assess. The reviewing court therefore may give substantial weight to the evaluation of credibility made by the hearing officer. *National Labor Relations Board* v. *Walton Manufacturing Co.*, 369 U.S. 404, 408; *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 492-497. In the

present case, the administrative law judge recognized the importance of the witness's testimony and specifically stated his reasons for finding the testimony credible (Pet. App. 11). This determination was properly adopted by the reviewing court "in answering the comprehensive question whether the evidence supporting [the] * * * order is substantial." *Universal Camera Corp.* v. *National Labor Relations Board, supra,* 340 U.S. at 497.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

DECEMBER 1977.